No. 15714

United States Court of Appeals

for the Ninth Circuit

UNION SLIDE FASTENER, INC.,

Appellant,

vs.

TALON, INC.,

Appellee.

SUPPLEMENTAL

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

In the United States District Court, Southern District of California, Central Division

Civil Action No. 10450-C

TALON, INC., Plaintiff,

vs.

UNION SLIDE FASTENER, INC., Defendant.

NOTICE OF MOTION FOR NEW TRIAL ON COUNTERCLAIM

To: Lyon & Lyon, Attorney for Plaintiff;

Please Take Notice that on the 12th day of August, 1957, at the hour of 10:00 a.m., or as soon thereafter as the matter can be heard, defendant will move the Honorable James M. Carter, in courtroom No. 10, Federal Building, Los Angeles, California, for an order vacating the judgment for plaintiff upon defendant's counterclaim, for an order granting a new trial to defendant on said counterclaim, and for such other orders as may be meet and just.

This motion will be based upon the files, records and transcript of testimony taken in this action and upon the grounds set forth in defendant's Basis For Motion For Rehearing on Counterclaim filed herewith.

Dated: June 7, 1957.

/s/ ALLAN D. MOCKABEE,
Attorney for Defendant. [2]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Defendant moves that the judgment entered herein on defendant's counterclaim be vacated and set aside and that a new trial be granted on the grounds set forth in the accompanying Basis For Motion For Rehearing on Counterclaim.

Dated: June 7, 1957.

/s/ ALLAN D. MOCKABEE,
Attorney for Defendant. [3]

[Title of District Court and Cause.]

BASIS FOR MOTION FOR REHEARING ON COUNTERCLAIM

The foregoing motion is made for the following reasons:

On the last day of the trial of this case, March 15, 1955, defendant, in support of its Counterclaim, was permitted to offer some proof on the subject of attorneys' fees and expenses incurred in the action, to show damage resulting to defendant from plaintiff's violations of the anti-trust laws. Defendant was also given the opportunity to present some evidence of the hardship and expense caused by the suit. But when defendant offered evidence tending to show a loss of profits, an objection by plaintiff was sustained. The Court said at Page 1104 of the record:

> "There is no causal connection shown, nor can any be shown, between what the loss is on the books for each fiscal year and any activities of the plaintiff in this action. Nor is the estimated earnings any more than a mere estimate * * * which doesn't take into account competition * * * and such things as the introduction of the Wilzip zipper * * *."

At this point, plaintiff's counsel interjected (R-1105):

> "I think the burden is on the defendant";

and, apparently, the Court accepted that argument, because the Court [4] then rejected the request of defendant's counsel to present some law on the subject, saying:

> "No, I am not going to permit you to do that. I have taken some proof on attorneys' fees and expenses, and time. These other matters are pure speculation. It is highly speculative. From the facts of this case I can't see how loss would be sustained by defendant by virtue of quota agreements entered into with other manufacturers.
>
> "This man never was subject to a quota agreement."

It is respectfully submitted, on the basis of decisions of the Supreme Court of the United States in anti-trust cases, which will be cited in an accompanying brief, that the Court misconceived the rules applicable to a case of this kind, and erred in the following respects:

1. In holding that the defendant had the burden of proof to show exact damages;

2. In ruling out evidence tending to show loss of earnings; and

3. In failing to give proper weight to the evidence in the case tending to establish the fact of damage to defendant and the fact that such damage occurred only because of plaintiff's actions.

Taking these points in inverse order, it appears that the Court's belief that there was no causal connection between plaintiff's action and defendant's injury, was grounded on the premise that defendant could lose nothing as the result of quota control agreements imposed on others, and that defendant, indeed, benefitted to a certain extent by the restrictions thereby imposed on other competitors.

It is respectfully submitted that the Court's reasoning on this subject would be flawless, if the defendant Union had actually been allowed to compete freely.

It is true that the quota control agreements did no direct damage to defendant. It is true that the suits against [5] other competitors of Talon likewise did no injury to defendant. It might also be argued that the "price control" meeting in the Los Angeles office of Talon on September 27, 1949, did no more damage to defendant than to other competitors, and that the public was the primary victim.

However, all of these actions by Talon, from the date of the American Agreement (Ex. A.H.) down to the Los Angeles meeting at which Talon attempted to maintain price control have been held by the Court to be evidence of a continuing attempt to control competition sufficient to fix upon Talon guilt of violation of the anti-trust laws.

Up to this point, it is possible for defendant to agree with the Court's opinion that there was no clear causal connection between Talon's acts and any damages suffered by defendant.

But, Talon's interference with competition, in pursuit of its attempt to control the high-speed zipper machinery industry, was not limited to the quota agreements, the price control meeting or the unprosecuted infringement suits against other competitors. Defendant stood in the way of the success of the plan and so was singled out for special attention and special interference. First, McKee obtained permission to see Union's plant. The report of his inspection to Talon gave no intimation that Union infringed. Then Talon proceeded to take the following steps:

1. Talon appropriated to its own use, without the consent of defendant, and without compensation to defendant, the improvements made by defendant on its machines, and observed by McKee on the occasion of his visit. These improvements were found on plaintiff's Exhibit 5. [6]

2. Talon first took an option on, and then purchased Silberman '793.

3. Talon brought suit against Union without making any inspection by a qualified engineer to determine whether or not Union was infringing,

and presented to the Court as an Exhibit of the machine of the Silberman patent a machine containing the improvements made by defendant.

All of these steps were part and parcel of Talon's attempt to control competition in violation of the anti-trust laws. They were not directed against all competitors. The sole target was Union. Union had succeeded, as the result of Lipson's ingenuity, in securing a competitive advantage by locating the "bugs" in high speed zipper machinery and by devising improvements which remedied them. Talon lifted the improvements and blithely put them to its own use, and then attempted to pawn them off as part of the structure of Silberman '793. Not content with simple commercial piracy designed to destroy Union's competitive advantage, Talon, in pursuit of its plan to restrain competition, acquired Silberman '793, adapted Union's improvements to the structure of that patent, and ruthlessly turned on its inadvertent benefactor by bringing an infringement suit against Union under Silberman '793, without any investigation by a qualified person to determine whether Union was infringing.

Clearly, the steps were taken to eliminate Union's competition, and clearly they were not isolated moves, unconnected with Talon's prior actions which have been found by the Court to be violative of the Anti-Trust laws. The purpose was not to slow down Union's competition—the object was to exterminate it. The [7] weapons used were more vicious, more costly to defendant, and better designed to throttle the competition offered by Union than any of the iniquitous quota control agreements condemned by the Court. The weapons were employed directly against Union and against no other competitor, and forged the links in the chain connecting Talon's violations of the anti-trust laws with the impact of the infringement suit upon Union, and its consequent damages.

It may be that Union's production was not directly restricted by these steps because it was not held to any quota and was not required to pay royalties. However, the effect was demonstrably greater, because defendant lost the competitive advantage it had secured by removing the "bugs" in zipper manufacturing machinery, before it had even a chance to launch itself in business; and, at the outset of its business career was compelled to use a substantial part of its resources to fight a litigation designed to "nip in the bud" its competition, and to put it out of business. Accordingly, there was an indirect but obvious and substantial interference with its production of zippers and the sale of its products.

The fact of damage to defendant is self-evident:

A. From the loss of its competitive advantage, and

B. From the very existence of the law suit and the expenses incurred in that connection.

It is a matter of record in this Court that defendant went through a reorganization proceeding under Chapter 11 of the Bankruptcy Act while the litigation was pending. It does not require conjecture or speculation, therefore, to determine whether

[8] the actions of plaintiff caused damage to defendant. Damage there certainly was, at the very least, in the form of litigation expenses, and those damages were proved with reasonable certainty. The only uncertainty was in the exact amount of other damages sustained by Union.

With respect to the other damages, defendant was improperly denied the right to offer evidence of estimated loss of profits, on the ground that an estimate would not take into account competition and other factors which might have had a bearing on such loss. On this subject, the Court erroneously sustained plaintiff's objection that defendant had the burden to rule out any other cause for its loss of profits.

In the light of the authorities referred to in the brief submitted herewith and the evidence adduced at the trial, it appears that defendant should have been permitted to offer such proof as it could, to show loss of earnings. It was not proper to require defendant to show with any greater certainty, with the means available to it, the exact amount of its damages. Defendant should have been allowed to offer such proof as it could regarding loss of profits.

In addition to the proof attempted to be offered at the trial, defendant also wishes to offer proof that plaintiff's lawsuit seriously injured its credit standing and resulted in defendant being forced to enter into a bankruptcy reorganization proceeding. This, and other matters will be dealt with in the affidavit of Philip Lipson submitted herewith.

The fundamental fact of damage having been esablished, it is respectfully submitted that the Court hould direct a rehearing on the counterclaim ierein, and permit further proof of damages, under he provisions of Rule 59 (a) F.R.C.P.; and that t should then assess an amount which, in its opinon, would be fair and reasonable compensation to lefendant, which amount should [9] be trebled.

Respectfully submitted,

ALLAN D. MOCKABEE,
/s/ ALLAN D. MOCKABEE,
Attorney for Defendant. [10]

[Title of District Court and Cause.]

AFFIDAVIT OF PHILIP LIPSON

State of California,
County of Los Angeles—ss.

Philip Lipson, being duly sworn, deposes and says:

I am president of the defendant and make this affidavit in support of defendant's motion for a re-hearing on the defendant's counterclaim.

For more than two years prior to the institution of this action, defendant had concentrated upon the designing and development of machines and methods for the mass production of zippers, the building of such machines, and a campaign to sell the same. Defendant was organized for that purpose. The actual production of zippers, during this period, was incidental only to test runs of machines. Although there was little tangible profit during this period, defendant had accumulated an intangible profit of an estimated $30,000 in a research and development reserve. [11]

Prior to March, 1949 defendant had built fifteen zipper chain production machines for sale to other manufacturers as well as for its own use and embarked on a campaign to sell machines to the trade.

From March to August of 1949, after deponent returned from Europe where he had an opportunity to observe the operation of defendant's machines, defendant devoted all of its time to improving the machines and in August 1949 introduced to the trade an improved line of machines producing a better grade of zipper, and defendant started building six additional zipper-chain machines. During the period from the middle of August to October 2, 1949, defendant received bona fide offers for more than 400,000 zippers, amounting to about $30,000.00, the largest order for 300,000 zippers having come from a Far Eastern exporter who claimed to have switched from plaintiff's line of zippers to defendant's.

Before this suit forced defendant to abandon his plans for selling machines, defendant sold thirteen chain-zipper machines and various auxiliary machines for a total price of $105,000.00, on which defendant realized a net profit of about $40,000.00. After plaintiff's action was commenced, defendant could no longer continue to negotiate for the sale of machinery without disclosing to prospective buyers that they might become involved in litigation. As a result, defendant neither manufactured nor

old any more machines although some buyers of-
ered to take the existing machines if defendant
vould agree that the sales price be placed in escrow
o insure them against infringement suits by Talon.
Consequently, defendant's substantial investment in
nachine tools for use in constructing chain ma-
hines was immobilized. Accordingly, as a direct
esult of the infringement suit defendant was de-
rived of potential profits in excess of $100,000.00
n the sale of additional zipper-chain production
nachines plus auxiliary machinery and equipment;
nd the opportunity then present to sell machines at
profit has [12] been irretrievably lost. Thus, de-
endant sustained damages due to the unjustified
uit brought by Talon which are clearly demonstra-
le and measureable.

On September 30, 1949, the Talon "price control"
neeting was held. Two days later defendant's fac-
ory was burglarized and set afire by persons un-
nown. The only items other than petty cash and
tamps taken by the burglars were drawings and
lue prints of the new designs and improvements
n defendant's machines. The older blueprints were
eft undisturbed as were expensive toolings. Eight-
en days after the "price control" meeting and fif-
een days after the burglary this suit was started.

As a result of the foregoing incidents, defend-
nt's business was immobilized and orders on hand
or zippers could be filled only partially with what
efendant was able to salvage of zippers in process,
nd then only to the local trade. Defendant's ability
o restore its plant to productive use after the fire

was retarded by the existence of this suit because he could not borrow from banks to make immediate repairs but was forced to wait for an insurance adjustment.

During the period from 1949 to 1955 defendant advertised for a partner or investor to invest additional capital for expansion of its business. Defendant was contacted by several prospective investors who were discouraged because of the Talon litigation and the lack of sufficient profits, the later resulting from expenditures required in the defense of the suit.

Being unable to sell machines or to attract additional capital because of the suit brought by plaintiff, defendant was forced to solicit defense work in order to utilize the facilities of his plant. He succeeded in securing sub-contracts for close tolerance work on small production runs for parts and subassemblies for guided missiles. Approximately 75% of this work was on sub-contracts from Hughes Aircraft Corporation of Inglewood, California. [13]

In order to expedite this work, and at the suggestion of the Hughes Corporation, defendant formulated a plan for modest expansion at a cost of $35,000.00, and after having had applications for bank loans rejected, applied to the Small Loans Division of R. F. C.

In this application, defendant disclosed the pendency of the Talon suit. Defendant was informed in April, 1951, that its application had been approved, but certain stipulations in the loan and mortgage agreement requested by the R. F. C. were deemed mpractical and costly. Defendant then proposed an mended plan calling for a smaller loan, after conferences with R. F. C. officials.

During the course of these negotiations, defendnt had an opportunity to purchase machine tools nd toolings from California Slide Fastener Corp., Los Angeles concern which was about to liquidate nd which was then negotiating to sell its assets vith, among others, a former associate of David Silberman. Having assisted this concern to improve ts machines and production methods, defendant ought and obtained permission from the Los Angees office of R. F. C. to purchase these machine ools and toolings instead of the machine tools specfied in the loan application on the strength of the elief, subscribed to by the local R. F. C. represenative, that the loan, having been approved, was bout 99% sure to be made. These machine tools nd toolings were then purchased by defendant, on temporary installment basis, pending the disbursement of the R. F. C. loan.

Thereafter, in June of 1952, defendant was notiied that its amended plan for an R. F. C. loan had een approved by the Washington office of R. F. C. nd defendant was requested to prepare all necesary documents, subordinations, etc. These documents, including a mortgage, were prepared, signed nd submitted to R. F. C. in July, 1952.

The fact of the loan and the execution of a mortgage by [14] defendant were published by R. F. C.; nd in August 1952, Mr. Sharpe, of the Los Angees office of R. F. C., assured defendant that the vouchers for the loan had been prepared and were ready for signature and disbursement.

But, apparently, somebody interested in causing trouble for defendant had taken note of the publication of the loan, and odd things began to happen. In September, two auditors of R. F. C. visited defendant's plant and went over defendant's books and records. In the purchases and expenditures of over $35,000.00, they found a slight error of $3.75. They then advised that a new profit and loss statement within thirty days of the date of the disbursement of the loan would be required.

After the new statement had been submitted, defendant was advised that, because Mr. Lipson's son-in-law, who is a C.P.A., had assisted in completing the statement because defendant's regular accountant was on vacation, defendant's books would have to be re-audited for a period 13 months past and a physical inventory taken by an independent auditing firm. Defendant reluctantly agreed, even though it had no assurance that the loan would come through, and that the additional expense of about $1,000.00 would be justified.

At the same time defendant, becoming suspicious of the difficulties with R. F. C., arising as they did after the loan had been approved, and while defendant was waiting for the disbursement of the proceeds, wrote to Hon. Norris L. Poulson, then Congressman from Los Angeles, soliciting his assistance in clearing up the situation.

When the re-audit had been completed, it substantiated defendant's statement to the R. F. C.

vithin a fraction of a percent regarding the ratio of assets to liabilities. Further demands were made by R. F. C. requiring extensions on certain debts contracted for inventory purchases and subordinations on other loans made during [15] the interim to meet installment payments on the machine tools and toolings purchased from California Slide Fastener Corp. Defendant satisfied these demands.

On February 12, 1953, defendant was advised that the approval of his loan had been revoked. No reason was stated by R. F. C. but the following day defendant received from Congressman Poulson a copy of a letter to him from the Small Loans Division of R. F. C., copy of which together with copy of certification thereof by R. F. C. is attached hereto and marked Exhibit A.

As appears from that letter, the existence of the Talon suit, and the then imminence of the trial of that suit on April 21, 1953, plus the possibility that damages might be awarded against defendant, were the key reasons for the revocation of the loan. With respect to the reason given, in addition, that the loan was not justified from the credit standpoint, obviously, when defendant with the knowledge and permission of R. F. C., incurred what it thought would be a temporary debt to purchase machine tools and toolings from California Slide Fastener Corp., its credit picture naturally underwent a change. That situation would have been rectified immediately upon the granting of the loan, because the loan proceeds were intended to pay for those items.

It thus appears that the suit by Talon, although disclosed by defendant when it first filed its application, and although it did not affect the original granting of the loan, was the real basis for revocation and that the other reasons given were mere "window dressing."

As a result of the revocation of the R. F. C. loan, defendant found itself in a precarious financial position and was forced to ask for relief under Chapter 11 of the Bankruptcy Act. For the next three years, defendant incurred expenses of $3,000.00 per year to factor its accounts, plus legal expenses connected with the reorganization of $3,000.00. [16]

Defendant does not know that Talon had anything to do with the revocation of its R. F. C. loan, apart from the fact that its pending infringement suit was cited as a principal reason for such revocation. However, defendant submits that it should have the opportunity to offer the evidence it has on this matter and to examine the records of R. F. C. pertaining to its application to find out whether there was something irregular in the handling of the transaction by R. F. C. The chain of events preceding the revocation was most unusual, and what happened subsequently gives further reason for believing that Talon was the motivating force behind defendant's difficulties which started when the suit was filed and thereafter multiplied almost geometrically.

After the defendant went into reorganization, the American Credit Insurance Company acted as representative of several major Group A creditors. The local manager of that company informed defendant that it knew a prospective buyer of defendant's business whom defendant then contacted. The man your deponent met was a Mr. Cargill who stated that he represented an undisclosed principal. Mr. Cargill stated that he was unworried about the Talon suit because his client had contacts with Talon officials, and could probably effect a satisfactory settlement. After the first conference, deponent met Mr. Cargill again and was advised by him that his client had assurances from Talon that a satisfactory disposition of the suit could be arranged. He made a proposal to bail defendant out of its difficulties by making a composition with Class A creditors involving a lump sum cash payment of $23,000.00, and by issuing to Class B creditors, excluding deponent and members of his family and friends who had claims for monies loaned, preferred stock in a new corporation to be organized by his client. Defendant's Board of Directors declined the offer, and defendant, with the aid of Class B creditors, successfully resisted pressure by the Class A creditors to force the acceptance of Mr. Cargill's offer. If the offer had [17] been accepted, the stockholders of defendant would have received nothing.

Even during the trial of this action, some members of the garment trade were propagandized to confine their purchases of zippers to a selected group of manufacturers excluding defendant. Annexed hereto as Exhibit B is a copy of a communication emanating from the New York office of J. C. Penney Company which came to defendant's attention. It will be noted that the "approved" list names Talon and its cross-licensed "second string quarterback," Conmar, plus the "reserves," Crown, Prentice, Scovill, Waldes and Ideal, all of whom are Talon licensees: the group in which the major portion of the zipper business is concentrated.

This affidavit is submitted to the Court to establish the fact of damage to defendant as the result of this suit and other activities which have all but crushed defendant financially.

Apart from the question of whether Talon was responsible for the incidents and activities here related, not all of which have been set forth, it is clear that defendant is in a position to offer concrete evidence of actual money losses sustained by defendant as the direct result of this action, and begs leave of the Court to be granted such opportunity at a rehearing of the counterclaim herein.

It is respectfully submitted that to permit plaintiff to go practically "scot" free, while leaving the object of plaintiff's malice lying prostrate, without compensation for damages which defendant would not have suffered but for Talon's action, would be a substantial denial of justice.

/s/ PHILIP LIPSON.

Subscribed and sworn to before me this 6th day of June, 1957.

[Seal] /s/ HELEN WEIGHTMAN,

Notary Public. My Commission Expires March 6, 1960. [18]

RECONSTRUCTION FINANCE
CORPORATION
Washington

Certificate

I, M. W. Knarr, Secretary of Reconstruction Fi-
ance Corporation, a corporation created and exist-
ıg pursuant to the Reconstruction Finance Corpo-
ation Act, approved January 22, 1932 (47 Stat. 5),
s amended, do hereby certify that annexed hereto
s a true and correct copy of a letter from Harry
. McDonald, Administrator, Reconstruction Fi-
ance Corporation, Washington 25, D. C., to Hon-
rable Norris Poulson, House Office Building,
Vashington 25, D. C., dated February 13, 1953.

In Witness Whereof, I have hereunto set my
and and caused the seal of Reconstruction Finance
Corporation to be affixed at Washington, D. C. on
his 2nd day of October 1956.

[Seal] /s/ M. W. KNARR,
Secretary, Reconstruction Fi-
nance Corporation. [19]

RECONSTRUCTION FINANCE
CORPORATION
Washington 25, D. C.

Feb. 13, 1953

Honorable Norris Poulson
House Office Building
Washington 25, D. C.

Dear Mr. Poulson:

In furtherance of Mr. O'Donnell's telephone conversation with Miss Webb of your office, the authorization of a $34,690 loan to Union Slide Fastener, Inc., Los Angeles, subsequently reduced to $28,440, has been cancelled.

Since authorizing this loan investigation has disclosed a decidedly unfavorable financial condition. An analysis of a recently completed audit reveals that the statement submitted by this company with its loan application was inaccurate and did not reflect the true financial condition; that the net income is not sufficient to currently retire the monthly installment obligations; that the proposed loan proceeds would not be sufficient to bring borrower's payables into current condition; and an adverse change in the borrower's condition during the period from September 30, 1951 to October 31, 1952.

From a credit standpoint there is no basis whatsoever for an RFC loan and if the patent infringement suit filed by Talon, Inc., against the company, set for trial April 21, 1953, should be successfully prosecuted the applicant's financial condition would probably be untenable.

The enclosures submitted with your letter of February 10, 1953 are herewith returned. In view of all of the unfavorable factors brought to light in connection with this case the RFC had no alternative but to cancel the loan authorization.

Sincerely,

/s/ HARRY A. McDONALD,
Harry A. McDonald,
Administrator. [20]

This is a letter directed personally to you asking vour attention to garment zippers. We have a recorrd of constant complaints on certain brands of ippers. Therefore, in line with our policy of qualty control, I would like to point out zippers which he J. C. Penney Company laboratory considers cceptable. They are:

Conmar, Crown, Prentice, Scovill, Talon, Waldes, Serval, Ideal (the order in which they are named loes not indicate our rating).

We ask that you do not use any other brand of ippers. If you have any doubts about the identity of any other zipper you may have used in the past out not mentioned above, please telephone us.

We would appreciate your acknowledgment of his letter indicating that you have read and undertand it. Please comply by filling in and returning he stub at the bottom of this letter.

Very truly yours,

J. C. PENNEY COMPANY, INC.,
/s/ H. T. GRANOIEN, M,
H. T. Granoien.

HTG:m

Date.....................

J. C. Penney Company, Inc.
3460 Wilshire Blvd., L. A. 5, Calif.
Attn: H. T. Granoien

We have received, read and understand your leter dated March 3, 1955 regarding zippers acceptable to the J. C. Penney Company laboratory.

Firm ....
By ....

[Title of District Court and Cause No. 10450-C.]

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR REHEARING ON COUNTERCLAIM

This is a motion by defendant to reopen the trial to permit the production of further evidence in support of defendant's counterclaim, and for a rehearing on the counterclaim.

The basis of the motion is outlined in the motion proper. This brief will be devoted to a discussion of the principles of law involved.

Proof of Damages

It is well settled that in a suit for treble damages under the anti-trust laws, where the evidence produced tends to show the fact of damage, the wrongdoer (the plaintiff in this case) must bear the risk of the uncertainty which his own wrong has created; that the burden of proving exact damages is not on the injured party; and that where damages cannot be proved precisely, the Court may make a reasonable estimate based on relevant data.

Bigelow v. R.K.O. Radio Pictures, 327 U.S. 251.

Story Parchment Co. v. Paterson Co., 282 U.S. 555. [22]

Eastman Kodak Co. v. Southern Photo Co., 273 U.S. 359.

In the Bigelow case, plaintiff sued for treble damages under the Sherman and Clayton Acts, based on an unlawful conspiracy preventing plaintiff from securing first-run motion pictures.

Plaintiff offered proof of damages in the alternative. One line of proof was directed to loss of earnings representing the difference between earnings of a competitor theatre of comparable size and plaintiff's theatre, after the conspiracy became effective. The other line attempted to make a comparison between plaintiff's receipts from its theatre during the five year period after the institution of the conspiracy, and plaintiff's earnings for the four preceding years.

The Circuit Court of Appeals had held that the proof offered did not furnish a proper measure of damages. It said that the proof did not take into account many other factors which might have affected the earnings of the plaintiff during the five year period following the conspiracy, in the absence of the illegal distribution of film.

The Supreme Court held that the evidence produced tended to show damage, and that it was proper for the jury to assess the amount thought proper to compensate plaintiff.

The court said:

> "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery."

The Court, through Mr. Chief Justice Stone, then referred to the cases of Story Parchment Co. v. Paterson Co. (supra) and Eastman Kodak Co. v. Southern Photo Co. (supra), both of which were actions to recover treble damages for violations of the anti-trust laws, and both of which involved damages difficult to prove with any degree of certainty. Mr. Justice Stone said at Pages 264 and 265: [23]

> "The tortious acts had in each case precluded ascertainment of the damages more precisely. * * * Nevertheless, we held that the jury could return a verdict for plaintiffs * * *.
>
> "In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances 'juries are allowed to act upon probable and inferential, as well as direct proof' (citing the Story and Eastman cases). Any other rule would permit the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery." (Emphasis supplied.)

The Court then quoted, with approval, the following language in Story Parchment Co. v. Paterson Co. (supra):

> "The most elementary conceptions of justice and public policy require that the wrongdoer

shall bear the risk of the uncertainty which his own wrong has created. * * * That principle is an ancient one * * * and is not restricted to proof of damages in anti-trust suits, although their character is such as frequently to call for its application." (Emphasis supplied.)

The identical principles have been recognized and applied in the State and Federal Courts in California. [24]

Learned v. Castle, 78 Cal. 454 at 461.

Hanlon Drydock v. Southern Pacific, 92 Cal. App. 230.

Permanente Metals Corp. v. Pista, 154 Fed. 2nd 568 (C.C.A. 9th).

These principles should be applied in the case at bar. The evidence spells out, with certainty, the fact of damage. Surely, the defendant would not have incurred the expenses of this lawsuit if Talon had not attempted to use this Court to assist it in carrying out its plan to restrain competition by stamping out the competition which Union had just placed itself in a position to offer. Just as certainly, the appropriation by Talon of improvements made by defendant to high-speed zipper machinery and the attempt by Talon to graft those improvements on the machine of Silberman '793 to justify its infringement suit against defendant, resulted in the loss of a competitive advantage with which defendant started its business, and imposed on defendant burdens which did not exist until Talon instituted its campaign against Union. The wrongdoing of

Talon has been established; and its wrongful acts constituted but another phase of its plan to restrain competition. The primary victim was Union. Because Union had no previous business record, it found itself in a difficult position to prove its damages with mathematical certainty, but offered the best proof available to it, and would have offered more, if permitted to do so.

Under the circumstances, Union should have the opportunity to supply to the Court whatever relevant data it can produce to enable the Court to make a just and reasonable determination of the amount it is entitled to as compensation.

Causal Connection

In the Court's memorandum to counsel deciding the various issues in this case, the Court said:

> "We also believe that Kobe, Inc. v. Dempsey Pump Co. [25] (10 Cir. 1952) 198 F. 2nd 416, cert. den. 344 & S. 837, has many features similar in our case and is, at least, persuasive."

The chief similarities were the following:

1. Kobe had, prior to its action against Dempsey, committed violations of the anti-trust laws.

2. When the Dempsey pump was placed on the market, Kobe decided to "do something about it"; and the President of Kobe attended a public demonstration of the Dempsey pump.

3. When Dempsey denied infringement of the Kobe patents, Kobe brought an infringement suit against Dempsey without "concrete information that the Dempsey pump infringed any of Kobe's patents."

On the basis of these findings the Court held that the lawsuit was no more than a part of the original plan to corner the hydraulic pump business for oil wells, "designed to nip this competitive threat in the bud." (Page 424.)

Plaintiff's argument that there is no connection between its past actions, which have been found by the Court to be illegal, and the lawsuit against defendant, because plaintiff's only adverse action against the defendant as the filing of this lawsuit, ignores the fact that the lawsuit was simply another weapon added to its arsenal of equipment for use in restricting competition. In the Kobe case, Kobe had not taken any action against the interests of Dempsey other than the filing of the infringement suit, and the Court there held that the lawsuit was related to Kobe's monopolistic scheme.

The Kobe case was, in fact, weaker on the point of causal connection between Kobe's violations of the anti-trust laws and the injury to Dempsey, because Kobe, unlike Talon, had not set up a pattern of quota control agreements. Kobe had merely acquired all available patents, and had suppressed some while using the others for its sole benefit. Yet the Court in the Kobe case had no [26] hesitation in finding that the infringement action against Dempsey, considered in the background of the monopolistic scheme which preceded that suit, was a step taken by Kobe to give effect to the unlawful plan to restrict competition.

It is respectfully submitted, upon the authority of the Kobe case, and on the evidence adduced at the trial, that the infringement suit against defendant was clearly but another phase of Talon's plan to restrict competition in the high-speed zipper industry. It is also respectfully submitted that the damage sustained by Union included more than the costs of the litigation; and that the losses sustained by Union were due, at least in part, to the bringing of the suit by Talon. As noted at a prior point in this brief, the burden of showing what part of the losses were contributed to by the Talon suit is not on the defendant, because Talon cannot benefit by its own wrongdoing and must assume the risk of uncertainty in fixing defendant's damages.

Respectfully submitted,

ALLAN D. MOCKABEE,
/s/ ALLAN D. MOCKABEE,
Attorney for Defendant. [27]

Affidavit of Service by Mail Attached. [28]

[Endorsed]: Filed June 7, 1957.

[Title of District Court and Cause.]

MEMORANDUM IN OPPOSITION TO MOTION FOR NEW TRIAL

The defendant has moved for a new trial with respect to its counterclaim for damages under the antitrust laws. Defendant does not allege any newly discovered evidence, and the sole ground for support of the motion appears to be the claim of the defendant that the court made an error of law in concluding as it did that the defendant has failed to prove injury to its business or property arising out of any of the acts of plaintiff.

Far from making an error of law in this regard, the court was applying well-settled rules to the effect that damages cannot be awarded where the proof fails to show the fact of damage resulting from the acts of the accused complained of. Defendant has produced no evidence of any act of Talon, Inc. which could in any way affect the defendant in its business or property other than [29] the filing of this law suit. The patents herein sued on do not relate to zippers themselves, and hence the existence of this law suit had no effect and could have had no effect upon defendant's sales of zippers. Absent infringement or claimed infringement by the zippers, no one could have had the slightest fear of being involved in infringement by purchasing zippers manufactured by the defendant. As respects the machines for manufacturing the zippers, neither the record in this case nor the showing by defendant in support of this motion shows that any machines were sold prior to institution of suit, much less that the suit caused loss of machine business. At the time of suit, defendant was merely attempting a selling campaign.

Defendant's history is simply that of an unsuccessful business, and nothing by way of evidence, in the record or offered pursuant to this motion, shows its lack of success to have been caused by plaintiff's activities. Rather, that lack of success appears to have stemmed from other things. Thus, from Mr. Lipson's affidavit, we find that at the inception of this litigation, he had no established business. At about the time the litigation commenced, he suffered a fire and a burglary, was undercapitalized, and his business suffered because he had to await adjustment on his fire insurance.

Relying upon a hoped-for Reconstruction Finance Corporation loan, he overextended in order to get into defense work. The Reconstruction Finance Corporation which originally tentatively approved a loan although it had full knowledge of the instant suit, rejected the loan not simply because of the instant suit but because:

"An analysis of a recently completed audit reveals that the statement submitted by this company with its loan application was inaccurate and did not reflect the true financial condition; that the net income is [30] not sufficient to currently retire the monthly installment obligations; that the proposed loan proceeds would not be sufficient to bring borrower's payables into current condition; and an adverse change in the borrower's condition during the period from September 30, 1951 to October 31, 1952."

Thus, the fact that defendant's business was unsuccessful and that defendant was forced into a corporate reorganization is not shown to have been caused by the acts of plaintiff. Defendant's own showing demonstrates plainly its inability to establish this causal connection with the certainty demanded by the law. Indeed, the showing seems to indicate quite oppositely to defendant's contentions. Witness the letter from J. C. Penney Co., shown in no way to be connected with plaintiff, which only establishes that J. C. Penney Co. considered zippers such as those manufactured by defendant to be inferior.

This case is comparable to the case of Chiplets, Inc. v. June Dairy Products Co. (D.C.D.N.J., 1953) 114 F.S. 129 which was itself a patent infringement action in which the defendant counterclaimed under the antitrust laws. In that case, the court stated:

"The burden is upon the intervenor to prove not only that the license agreements were used by the plaintiff in violation of the Act but also that their use in the course of commerce was the direct and proximate cause of injury to its business. A claim for damages may be sustained only upon proof of these elements. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555, 55 S.Ct. 248, 75 L.Ed. 544, et seq., Kobe, Inc. v. Dempsey Pump Co., 10 Cir. 198 F.2d 416, 425, 426; Turner Glass Corp. v. Hartford-Empire Co., 7 Cir., 173 F.2d [31] 49, 51, 52; Shotkin v. General Electric Co., 10 Cir., 171 F.2d 236, 238, 239. There can be no recovery in the absence of such proof."

(Emphasis supplied)

A similar case is Ronson Patents Corp. v. Sparklets Devices, (D.C.E.D.Mo., 1953), 112 F.S. 676, which was again a patent infringement action with a counterclaim for damages for violation of the antitrust laws. In considering the question of damages, the court there held:

"The rule of law on damages is not a matter of dispute. Defendants must prove a pecuniary loss to its business; it must be proven by facts from which their existence is logically and legally inferable. Possibility or conjecture as to the causal connection between the wrong and the injury is insufficient."

(Emphasis supplied)

It is apparent from defendant's memorandum in support of its motion for rehearing that it is confusing the rule as to the degree of proof required for extent of damage with the rule of law as to the degree of proof required for the fact of damage suffered as a result of the acts complained of. The law does not permit any conjecture or failure of proofs as to the fact of damage and as to the causal relationship between the acts complained of and this damage. While the rule of certainty may be relaxed in establishing the amount of damages after the fact of damages is proved, it is never relaxed as respects proof that the fact of damage should be attributed to another's wrong-doing. As stated in Story Parchment Company v. Paterson Parchment Paper Co., (1930) 282 U. S. 555, 75 L.ed 544 at page 548:

" * * * It is true that there was uncertainty as to the extent of the damage, but there was none as [32] to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. * * *"

Departure from this rule has never been suggested, and it is the rule followed in Kobe, Inc. v. Dempsey Pump Co., (10 Cir., 1952) 198 F.2d 416, the principal case relied upon by defendant's in this motion. It is exactly at this point that the defendant's proof fails, and the court was quite correct when it said "There is no causal connection shown, nor can any be shown, between what the loss is on the books for each fiscal year and any activities of the plaintiff in this action."

All of the authorities relied upon in defendant's memorandum of law, with the exception of the Kobe case, relate to proofs as to the extent of damage. Defendant has not and cannot produce a case, including the Kobe case, which permits any weakness in the proofs of legal causation, and it is therefore unnecessary for us to take issue with the statements quoted in defendant's legal memorandum for the simple reason that they apply to the extent of the damages and not to legal causation.

The defendant complains of three things which it states the plaintiff has done which resulted in the damages it seeks. The first of these is alleged appropriation of the improvements Lipson is alleged to have made on the machines. An appropriation of such improvements by plaintiff would not constitute a violation of the antitrust laws, and no causal connection whatsoever has been shown between such alleged appropriation and any damages to defendant.

Defendant next complains of plaintiff's purchase of the Silberman patent. This purchase of the Silberman patent cannot of itself have resulted in any damage to defendant. This brings [33] us to the sole remaining basis for the allegation of damage, the institution of the present law suit. Defendant has been fully compensated for its costs in defending this suit by the award of $20,000 in attorneys' fees, and we believe it to be clear that the mere institution of the suit without more cannot be the basis for the recovery of damages by the defendant on the theory of the violation of the antitrust laws. Further, even if there were shown conduct accompanying the institution of suit upon which a holding of violation of the antitrust laws could be based, it would have to be established with certainty that that conduct, coupled with institution of the suit, caused the asserted damage. That is the holding in the Kobe case cited by defendant.

The Kobe case involved a complete monopoly of commerce in rodless pumps, Kobe having acquired same over a period of 25 years preceding the suit by various acts and contracts held by the court to have been in violation of the antitrust laws. At no time had Kobe ever granted licenses, and, at the time of its suit against Dempsey, Dempsey was its only competitor. When Dempsey entered the rodless pump business, Kobe began a campaign of harrassment whose only object was the driving of Dempsey from the field. This included verbal notices and the like to Dempsey customers to the effect that Dempsey would be sued; it involved statements by the Kobe management to the effect that no one could build a rodless pump without infringing one of Kobe's patents; it involved institution of the patent infringement suit; and most important it involved the sending by Kobe to all of Dempsey's customers or potential customers implied threats in the form of notices of the suit, the latter being accomplished by the mailing of a circular letter to the purchasing agents of the forty major purchasers of pumping equipment in the central part of the United States. These activities were found by the [34] court to be "disastrous to the defendant" and to have brought the business of Dempsey "almost at a standstill." The court further found that Kobe had succeeded in instituting an industry-wide boycott of Dempsey's products and that the business of Dempsey, an established business when the suit was begun, had been driven to the wall by Kobe and by Kobe alone.

The history of the activities by Kobe constituting its violation of the antitrust laws is not relevant to this motion, it being sufficient to say that Kobe had violated the law. On the issue of damages, however, two points stand out in the court's decision, one having to do with the effect of the mere filing of a suit and the other having to do with the necessity of proving damages with certainty. First, the court indicated that had there been nothing more than the mere filing of the action, resulting damages could not be recovered. The court stated at page 425:

"We have no doubt that if there was nothing more than the bringing of the infringement action, resulting damages could not be recovered, but that is not the case."

This is but recognition of the well-established rule set forth in Virtue v. Creamery Package Co. (1912), 227 U. S. 8, 57 L.ed 393; International Visible Systems Corp. v. Remington-Rand, Inc., (6 Cir., 1933) 65 F.2d 540; Straus v. Victor Talking Machine Co., (2 Cir., 1924), 297 F. 791, bottomed on the proposition that free and unrestricted access to the courts should not be denied or imperiled.

Unlike the Kobe case, there is nothing in the instant case to distinguish our situation from the cases cited above. There is neither proof nor even allegation here that plaintiff has done anything in any way to interfere with defendant's business in the sale of zippers or machines for making [35] zippers; there has been no general campaign to suppress defendant's business; and there has been no approach to customers, verbal or otherwise.

Second, the court in deciding the Kobe case gave full effect to the rule referred to above, namely, that although a certain latitude will be permitted in proving extent of damages, the fact of damage and its causal connection with the acts of the plaintiff must be proved with certainty. The court in the

Kobe case found that following the filing of the suit by Kobe and the various notices to the trade, Dempsey's business was brought to a standstill and a virtual industry-wide boycott of the Dempsey pump brought about. This finding was possible because to no other cause could be attributed the destruction of Dempsey's business. Kobe had a monopoly not present in the instant case, so the competitive efforts of others in the field were not a factor. Kobe had instituted a campaign of harrassment directed at Dempsey's customers, an activity absent in the instant suit. Evidence was present that this campaign was indubitably successful. Dempsey had an established business and was selling pumps prior to the boycott campaign and the institution of the suit, and the court was able to measure the business prior to Kobe's activities against the business subsequent to Kobe's activities. No such measure is here available. Finally, there was simply nothing in the record in the Kobe case to which to attribute Dempsey's loss of business other than Kobe's activities. There was not, as here, a robbery and a fire; there was not, as here, undercapitalization; there was not, as here, overextension in order to obtain defense business; there was not, as here, misplaced reliance upon the prospects of an R.F.C. loan; and the court expressly found the Dempsey pump to be a good pump and a satisfactory pump. Reference to the J. C. Penney Co. letter accompanying the instant motion indicates the likely possibility [36] that much of defendant's troubles can simply be attributed to a doubtful product.

Accordingly, it is respectfully submitted that this court was absolutely correct in ruling that there was no causal connection between any of the acts of the plaintiff and the alleged losses of the defendant. It is further urged that even had causal connection between those alleged losses and plaintiff's bringing of the instant suit been shown, damages cannot be predicated on the suit alone. Defendant's motion for a new trial should be denied.

Dated at Los Angeles, California, this 3rd day of July, 1957.

LYON & LYON,
/s/ By CHARLES G. LYON,
Attorneys for Plaintiff. [37]

Acknowledgment of Service Attached. [38]

[Endorsed]: Filed July 3, 1957.

United States District Court, Southern District of California, Southern Division

No. 10450-Central Civil

TALON

vs.

UNION SLIDE FASTENER.

MINUTES OF THE COURT

Date: August 22, 1957. At: San Diego, California. Present: Hon. James M. Carter, District Judge. Deputy Clerk: William W. Luddy. Reporter: John Swader.

Counsel for Plaintiff: Charles G. Lyon.

Counsel for Defendant: Allan Mockabee.

Proceedings: Hearing defendant's motion for new trial on counter claim.

Attorney Mockabee makes statement in support of said motion for new trial.

Attorney Lyon argues in opposition.

It Is Ordered that defendant's motion for new trial on the counterclaim is denied.

JOHN A. CHILDRESS,
Clerk,
/s/ By WILLIAM W. LUDDY,
Deputy. [39]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Talon, Inc., and Lyon & Lyon, McCoy, Greene & TeGrotenhuis, and Ralph E. Meech, its attorneys:

Notice is hereby given that Union Slide Fastener, Inc. hereby appeals to the Court of Appeals for the Ninth Circuit from the judgment entered in this action on August 22, 1957 and particularly to that portion of the judgment designating defendant's counterclaim.

Dated this 23rd day of September, 1957.

/s/ ALLAN D. MOCKABEE,
Attorney for Defendant. [40]

Affidavit of Service by Mail Attached. [41]

[Endorsed]: Filed Sept. 23, 1957.

[Title of District Court and Cause.]

MOTION TO EXTEND TIME TO FILE RECORD AND DOCKET APPEAL

Comes now the defendant, through its attorneys, and moves this Honorable Court for an order extending the time for the defendant-appellant to file the record and docket its appeal in the Court of Appeals for the Ninth Circuit, the full fifty days until December 20, 1957. This motion is based upon the annexed affidavit of Allan D. Mockabee.

/s/ ALLAN D. MOCKABEE,
Attorney for Defendant-Appellant.

Approved and so ordered:

/s/ LEON R. YANKWICH,
United States District Judge. [42]

[Title of District Court and Cause.]

AFFIDAVIT OF ALLAN D. MOCKABEE

State of California,
County of Los Angeles—ss.

Allan D. Mockabee, being first duly sworn, deposes and says:

That in this case there has been an appeal taken by defendant from the judgment against it on its counterclaim.

That one of counsel for defendant is located in

New York City and affiant has his offices in Los Angeles, California.

That William J. Graham, defendant's New York counsel, and affiant have been engaged in litigation in their respective jurisdictions, and affiant will be engaged in litigation requiring his attendance in court in the Southern District of California and in the Eastern District of Illinois during the month of October.

That in order for affiant and defendant's New York counsel to confer with each other and with defendant concerning this appeal it is necessary for counsel to have additional time [43] to properly deal with the matter.

/s/ ALLAN D. MOCKABEE.

Subscribed and sworn to before me this 4th day of October, 1957.

[Seal] /s/ HELEN WEIGHTMAN,
Notary Public in and for said County and State.
My Commission Expires: March 6, 1960. [44]

[Endorsed]: Filed October 4, 1957.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Comes now the appellee, Union Slide Fastener, Inc., and pursuant to Rule 17(6) of this Court designates as the record upon appeal the entire transcript of record as certified by the Clerk of the District Court for the Southern District of California, including specifically the following papers not specified in the Designation of the appellant: [46]

Defendant's motion for a rehearing on the counterclaim dated June 7, 1957

Plaintiff's opposition to the motion for a rehearing on the counterclaim dated July 3, 1957

Memorandum of the Court denying motion for a rehearing on the counterclaim dated August 22, 1957

Order of the Court denying motion for rehearing on the counterclaim dated August 22, 1957.

Dated at New York City, New York this 17th day of December, 1957.

ALLAN D. MOCKABEE,
WILLIAM J. GRAHAM,
/s/ By WILLIAM J. GRAHAM,
Attorneys for Defendant-Appellee. [47]

Affidavit of Mailing Attached. [48]

[Endorsed]: Filed Dec. 19, 1957.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 48, inclusive, containing the original:

Motion of Defendant for New Trial on Counterclaim.

Plaintiff's memorandum in opposition to Motion for New Trial.

Minute Order of Court—8/22/57 denying motion for new trial on counterclaim.

Notice of Appeal.

Motion to Extend time to File Record and Docket Appeal.

Designation of Record on Appeal.

I further certify that my fee for preparing the foregoing record, amounting to $1.60, has been paid by appellant.

Dated: December 19, 1957.

[Seal] JOHN A. CHILDRESS,
Clerk,
/s/ By WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 15714. United States Court of Appeals for the Ninth Circuit. Union Slide Fastener, Inc., Appellant, vs. Talon, Inc., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: December 20, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.